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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SUN COUNTRY BUILDERS, INC.,

Plaintiff and Respondent,

v.

COKER EQUIPMENT CO., INC.,

Defendant and Appellant.

D052434

(Super. Ct. No. GIC861217)

APPEAL from a judgment of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Affirmed.

Coker Equipment Co., Inc. (Coker) appeals after the superior court entered a judgment confirming an arbitration award in favor of Sun Country Builders, Inc. (Sun Country). Coker contends the court erred in confirming the award because the arbitrator exceeded his authority by modifying an interim award before issuing the final award. We reject this contention and affirm the judgment.

## FACTUAL SUMMARY

Sun Country leased a tower crane from Coker. As part of this transaction, the parties entered into three contracts: an equipment rental agreement, a subcontract agreement, and a service contract. The subcontract included an arbitration provision. The equipment rental agreement included an attorney fees provision.

After disputes arose regarding the three contracts, Sun Country sued Coker for breach of contract. The parties then stipulated to submit their disputes to arbitration under the Construction Industry Arbitration Rules of the American Arbitration Association (referred to here as the AAA Rules). The parties selected an arbitrator who had 23 years of construction arbitration experience.

Before the arbitration hearing, the parties filed arbitration briefs in which each sought breach of contract damages and each requested an attorney fees award. In its arbitration brief, Coker acknowledged the rental agreement contained an attorney fees provision providing the "prevailing party shall recover all its attorney fees and expenses." But Coker stated that "*[a]t this point, discussion regarding this issue is premature because there is no basis to determine who is the prevailing party. Coker also has an outstanding Section 998 offer which should be considered in awarding prevailing party fees. Coker thus requests that before issuing a final award, the Arbitrator provide the parties with a tentative award on the merits so that both parties have the opportunity to brief the appropriateness and amount of an attorney fee award, if any.*" (Italics added.)

After a four-day arbitration hearing ending on May 23, 2007, the parties and Arbitrator agreed the Arbitrator would issue an interim award by June 22. The parties later granted the Arbitrator an extension to July 6 to prepare the interim award.

On July 6, the Arbitrator sent a document to the parties, entitled "Interim Award & Explanation of Award." In the award, the Arbitrator found Sun Country was entitled to recover \$44,373 from Coker, and detailed the factual grounds for this conclusion. In a section entitled "Attorney's Fees and Costs," the Arbitrator found there was "no operable attorney's fees contract clause," but permitted the parties to file additional briefing on specified issues. This portion of the Interim Award reads as follows:

"[T]he contractual attorney's fees clause appears in the [rental contract]; however, the latter contract is super[s]eded by the terms of the [subcontract], which does not have an attorney's fees clause. The Arbitrator finds that there is no operable attorney's fees contract clause in this matter.

"The Arbitrator has been advised that a 998 Offer has been tendered from [Coker to Sun Country]. The Arbitrator is aware that a 998 Offer may not be relevant for *post* Interim Award considerations. The Arbitrator, however, extends the following filing/service schedule to counsel in order for counsel to provide relevant information, if any, to the Arbitrator with regard to the 998 offer.

"On or before [July 20], [Coker] shall file with the Arbitrator, and serve upon opposing counsel, such information that [Coker] asserts is relevant for a fees and costs consideration. On or before [August 3], [Sun Country] shall file, and serve upon opposing counsel, its response to [Coker's] filings, *as well as [Sun Country's] own assertions regarding any attorney's fees and costs consideration post Interim Award*. Upon receipt of the requested filings, the Arbitrator will then determine what further award, if any, is required in this arbitration. *A Final Award will issue on or before [August 24]*. If counsel determine that 998 consideration is not relevant, then both shall provide written notice of such determination to the case manager . . . [before July 13].

"Other than filings relevant to the 998 considerations, absolutely no other filings will be accepted at AAA or by the Arbitrator. [¶] Except as identified herein with regard to 998 considerations, this Interim Award is in full settlement of all claims and counter-claims submitted to this Arbitration. All claims and counter-claims, not expressly granted herein, are denied." (Italics added.)

On July 20, Sun Country sent a letter to the Arbitrator stating the Arbitrator made a clerical error in concluding there was no attorney fees provision in the parties' contracts. Sun Country said the Arbitrator's conclusion was based on his mistaken impression that the parties entered into the rental contract after the subcontract, and noted the uncontradicted evidence at the arbitration hearing established the contracts were signed at the same time. Sun Country also argued the Arbitrator did not have the authority to make a finding on the attorney fees issue because the parties had not yet had the opportunity to brief the issue and it had been undisputed by the parties in their prearbitration briefs that a valid contractual attorney fees provision applied in the case. In the letter, Sun Country noted that "[u]nlike a 'Final Award,' . . . the Arbitrator has the unfettered authority to correct and modify his Interim Award." But "out of an abundance of caution," Sun Country cited the statutory and AAA rules pertaining to a correction of a final arbitration award. (See Code Civ. Proc., § 1284; AAA Rule R-47.)

In response, Coker argued the Arbitrator had no authority to modify the award because AAA Rule R-47 prohibits an arbitrator from modifying an award except to

correct typographical or computational errors.<sup>1</sup> Coker also asserted the Interim Award permitted the parties to "submit only information relevant to any Section 998 offers" and Sun Country's letter did not comply with this request. Coker additionally challenged Sun Country's assertion that it was undisputed the rental agreement was executed the same time as the subcontract agreement.

Two weeks later, on August 9, the Arbitrator agreed to consider the attorney fees matter, and cited AAA Rule R-44(d), which states: "'The award of the arbitrator may include . . . an award of attorneys' fees if all parties have requested such an award . . . .'" The Arbitrator stated that both parties "requested attorney's fees" in their claims and counterclaims. The Arbitrator set forth a briefing schedule, and stated he intended to issue the Final Award by the previously-agreed date (August 24).

Sun Country thereafter submitted attorney declarations and supporting invoices pertaining to the amount of fees incurred in the matter. In opposition, Coker filed a lengthy letter brief, urging the Arbitrator not to award attorney fees because: (1) the Arbitrator had already ruled there was no contractual basis for the award; (2) there was no statutory basis for an attorney fee award; (3) Sun Country was not the prevailing party; and (4) the amount of Sun Country's request was unreasonable.

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<sup>1</sup> AAA Rule R-47 states: "Within twenty calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided."

On August 24, the Arbitrator filed its final decision, entitled "FINAL Award & Explanation of Award." In this final award, the Arbitrator reached the same conclusions on the merits of the parties' claims as he had in the Interim Award, but determined Sun Country was entitled to attorney fees under AAA Rule R-44(d). In explaining the attorney fees award, the Arbitrator first stated he agreed with Sun Country that he had made a mistake when he previously stated the parties' rental agreement (containing the attorney fees provision) had been superseded, and that this prior conclusion had been based on his "clerical error" regarding the dates of the various contracts. But the Arbitrator said he was not awarding attorney fees based on the rental agreement's attorney fees provision, stating: "Notwithstanding the validity or non-validity of this correction, *there is a further written agreement which provides for the consideration of attorney's fees.* . . . [¶] [AAA Rule R-44] reads in part: ' . . . (d) The award of the arbitrator may include . . . an award of attorneys' fees *if all parties have requested such an award*, or it is authorized by law, or by their arbitration agreement.' . . . Under this Rule 44, the Arbitrator is empowered to award attorney's fees ' . . . if all parties have requested such an award . . . ' *Both* [parties], in their respective Demand and Counter-claim/demand requested attorney's fees." (Emphasis in original.)

The Arbitrator further stated that he disagreed with Coker's arguments that the Interim Award precluded the Arbitrator from seeking additional briefing on the attorney fees issue, citing AAA Rule R-37, which provides that an arbitration hearing "'may be reopened on the arbitrator's initiative . . . at any time before the award is made. . . .'" The Arbitrator stated that: "By the *Interim Award* the Final Award is due on or before

[August 24]. [The request for further briefing was] appropriate and timely under [AAA Rule R-37]." The Arbitrator concluded Sun Country was the prevailing party, and it was entitled to attorney fees of \$80,670, and costs of \$4,003.

Sun Country then filed a petition in the superior court to confirm the Final Award. Coker opposed the petition and filed its own petition to vacate and/or correct the award. Coker challenged only the portion of the award granting attorney fees to Sun Country, arguing the Arbitrator exceeded his authority by "unlawfully" modifying the Interim Award.

The court granted Sun Country's motion to confirm, stating it agreed with Sun Country's argument that "the Interim Award did not, and was not intended by the arbitrator to, finally address which side, if either, was entitled to attorneys' fees and costs or the amount thereof." The court thus entered judgment in Sun Country's favor in the amount of \$129,046, which consisted of damages plus \$80,670 in attorney fees.

## DISCUSSION

California has a "'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. [Citations.]'" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*).) To further the policy favoring arbitration, courts indulge every reasonable intendment giving effect to such proceedings. (*Ibid.*) This strong public policy is further promoted by judicial recognition that arbitration awards may be vacated or corrected only on very limited statutory grounds, unless the

parties have agreed otherwise. (Code Civ. Proc.,<sup>2</sup> §§ 1286.2, subd. (a), 1286.6; see *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1354-1364; *Moncharsh, supra*, 3 Cal.4th at pp. 27-28; *Alternative Systems, Inc. v. Carey* (1998) 67 Cal.App.4th 1034, 1039.)

In contending the court erred in confirming the award, Coker relies on a single statutory ground: an arbitration award may be corrected and/or vacated if the arbitrators "exceeded their powers." (§§ 1286.2, subd. (a)(4), 1286.6, subd. (b).) In evaluating this contention, we review the superior court's ruling de novo, but give "substantial deference [to] the arbitrator's determination of his or her contractual authority. [Citations.] All reasonable inferences must be drawn in support of the award." (*Jones v. Humanscale Corp.* (2005) 130 Cal.App.4th 401, 408.) "[O]n issues concerning whether the arbitrator exceeded his powers,' reviewing courts 'must give substantial deference to the arbitrator's own assessment of his contractual authority.'" (*Glassman v. McNab* (2003) 112 Cal.App.4th 1593, 1601; accord, *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 372, 374; *Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 347-348.) "[A]rbitrators do not 'exceed[ ] their powers' . . . merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the controversy submitted to the arbitrators." (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775.)

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<sup>2</sup> All further statutory references are to the Code of Civil Procedure.



Coker contends the Arbitrator exceeded his statutory powers by modifying the Interim Award to add attorney fees because an arbitrator has no *power* to change an award on the merits "once [the] award is issued."

We agree that after an arbitrator issues a final decision, the arbitrator may modify the award only under narrow limited statutory grounds, such as correcting a numerical miscalculation or an inaccurate property description. (§ 1284.)<sup>3</sup> Unless the parties agree otherwise, the arbitrator does not have authority to reconsider issues finally decided "on the ground that he or she later determined a factual or legal error had been made in the award." (*Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal.App.4th 865, 877.) The arbitrator has no power to reweigh or reconsider the merits of the award, and any alteration to a final award without the consent of the parties will vitiate it. (*Ibid.*; see also *Elliott & Ten Eyck Partnership v. City of Long Beach* (1997) 57 Cal.App.4th 495, 501-504 [arbitrators have no power to make "supplemental" award on matters left open by original award]; *Banks v. Milwaukee Ins. Co.* (1966) 247 Cal.App.2d 34, 36-37 [arbitrator had no power to correct an award to include general damages].)

But these principles do not help Coker in this case because the Arbitrator did not modify a *final* award; instead he made changes to an *interim* award. The record makes

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<sup>3</sup> Section 1284 provides: "The arbitrators, upon written application of a party to the arbitration, may correct the award upon any of the grounds set forth in subdivisions (a) and (c) of Section 1286 . . . ." Section 1286.6 provides for correction if "(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; [¶] . . . [¶] (c) The award is imperfect in a matter of form, not affecting the merits of the controversy."

clear that the award was interim. The Arbitrator identified the July 6 award as an "Interim Award," sought further briefing, and stated the "Final Award will issue on or before" August 24, 2007. By stating he would issue a final award within 60 days after preparing the Interim Award, the Arbitrator maintained his jurisdiction to make further rulings on the matters at issue in the arbitration proceeding. The Arbitrator properly gave the parties notice of the intended modification, and the parties had the opportunity to brief the relevant issues.

There is no statutory authority precluding an Arbitrator from changing an *interim* ruling under these circumstances. The Interim Award was not a final award subject to confirmation; instead it was a preliminary ruling pending a final arbitration decision. Similarly, AAA Rule R-47, the rule prohibiting modifications to arbitration awards, necessarily pertains to final awards. As recognized by the Arbitrator, the applicable AAA rules specifically permit an arbitrator to "reopen" an arbitration hearing *before* issuing an arbitration "award." This rule necessarily contemplates that it is the final award (and not an interim award) that cannot be modified.

Coker argues the Interim Award was final because the Arbitrator made a final ruling on attorney fees. This argument is factually unsupported. The Arbitrator stated only that there was no "operable attorney's fees contract clause in this matter," and did not state or suggest there were no other grounds for attorney fees. Coker posits that the Arbitrator necessarily must have been referring to AAA Rule R-44(d) when he said there was no "operable attorney's fees contract clause" because the AAA rules implicitly became part of the parties' contract by incorporation. However, in the Interim Award, the

Arbitrator discussed only the attorney fees provision in the parties' *rental contract* and his belief that this rental contract was superseded. Viewing these statements in context, the Arbitrator was referring to the express attorney fees clause in the parties' underlying contracts, and not to an independent basis for fees under the arbitration rules. Although Coker may be technically correct that the AAA rules became part of the parties' contracts, the issue here is whether the Arbitrator intended to make a final ruling on the attorney fees issue. Read in a reasonable manner, the Arbitrator's statement that there was "no operable attorney's fees contract clause in this matter" referred to the provision in the parties' underlying rental agreement and does not reflect that the Arbitrator intended to make a final ruling on the availability of attorney fees under AAA Rule R-44(d), or on any other ground.

Other portions of the Interim Award support this conclusion. In providing the parties an opportunity to brief the section 998 issues, the Arbitrator specifically stated that Sun Country was entitled to file a response to Coker's section 998 claims "*as well as [Sun Country's] own assertions regarding any attorney's fees and costs consideration post Interim Award.*" (Italics added.) This statement shows the Arbitrator did not intend to bar all further consideration of the attorney fees issue and undermines Coker's claim that the denial of fees in the Interim Award necessarily embraced fees awarded pursuant to AAA Rule R-44(d). If the Arbitrator believed there was no possible basis for attorney fees when it issued the Interim Award, there would have been no reason to ask for further briefing on "attorney's fees" pertaining to section 998. As Coker acknowledges in its appellate brief, "Section 998, standing alone, does not authorize an award of fees." By

permitting further briefing on section 998 "as well as" attorney fees considerations, the Arbitrator necessarily contemplated the possibility there was an alternate basis for an attorney fees award. Indeed, the Arbitrator's request for further briefing mirrors Coker's prearbitration brief in which Coker asked the court to defer ruling on *attorney fees issues* until after the issuance of the interim award to provide the parties the opportunity to brief the impact of a section 998 offer *on a party's right to attorney fees*.

We recognize the Arbitrator also made statements in other portions of the Interim Award that seemed to preclude further briefing on attorney fees issues. However, at most these statements created an ambiguity as to the Arbitrator's intent. To the extent the Arbitrator's subjective intention regarding the finality of the attorney fees issue was ambiguous, we are required to defer to the Arbitrator's resolution of this ambiguity. The Arbitrator expressly rejected Coker's contention that the Interim Award precluded it from considering the attorney fees issue before issuing the Final Award. Given that the Arbitrator prepared the Interim Award and was most familiar with the issues and the parties' positions asserted in the arbitration proceeding, we accept the Arbitrator's reasonable construction of its own order. We must give substantial deference to an arbitrator's assessment of his or her own authority "further[ing] the policies set forth in *Moncharsh* and its progeny of ensuring finality of, and limiting judicial intervention in, the arbitration process." (*Delaney v. Dahl* (2002) 99 Cal.App.4th 647, 659; *Moncharsh*, *supra*, 3 Cal.4th at p. 10.)

Additionally, it appears the parties did not brief the attorney fees issue before the Arbitrator issued the Interim Award. Instead, *Coker* specifically requested in its pre-

arbitration brief that the court *defer attorney fees rulings* until the final award, in part, because of the need to first determine the identity of the prevailing party. If the court had intended to make a final decision on the attorney fees issue without the benefit of any briefing or argument on the issue, this determination itself would have been beyond the arbitrator's authority, as agreed by the parties. An arbitrator does not have the authority to decide issues that have not been submitted to him or her. (See *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443; see also *Cable Connection, Inc. v. DIRECTV, Inc.*, *supra*, 44 Cal.4th at p. 1355.) In California, the "'policies favoring the efficiency of private arbitration as a means of dispute resolution must sometimes yield to . . . [the] requirement that arbitration shall proceed *as the parties themselves have agreed.*'" (*Cable Connection, supra*, 44 Cal.4th at p. 1358, italics in original.)

On the record before us, the court did not err in confirming the arbitration award.

#### DISPOSITION

Judgment affirmed. Appellant to pay respondent's costs on appeal.

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HALLER, J.

WE CONCUR:

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McCONNELL, P. J.

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NARES, J.